PUTRA v. SIVAGNANAM & ANOR.

[C.A. (Thomson C.J., Rigby and Hepworth JJ.)
December 1, 1958]

[Ipoh — F.M. Civil Appeal No. 15 of 1958]

Court of Appeal — Finding of fact by trial Judge — Credibility of witnesses — Discrepancy of evidence — Evidence taken on commission differing from statement to police — When new trial should not be ordered — When Court of Appeal should exercise its powers under Courts Ordinance, 1948, s.38(4).

Investigation — Importance of recording statements from potential witnesses to a crime or accident at earliest possible opportunity — Observations on method of investigation.

When deciding what considerations should weigh with a Court of Appeal when it is asked to upset a finding of fact by the trial Judge based on evidence of witnesses whom the Judge had not seen or heard, the Court of Appeal has the same means of judging of its value as the Judge had at the trial. The Court of Appeal must try the case, and see whether it differs from the trial Judge; and if it does, it must give the judgment which it thinks he ought to have given.

In this case the Court of Appeal considered that the case had reached the stage where it was in just as good a position as the learned trial Judge who tried the case to decide it as a whole and held that it would be wrong to place the appellant's case in jeopardy again on the particular point in issue and exercising its powers under section 38(4) of the Courts Ordinance adjourned the appeal for further argument to its next sitting.

Observations on credibility of witnesses and discrepancy of evidence.

Observations on method of police investigation.

Cases referred to:—

(1) *Paquin Ltd.* v. *Beauclerk* [1906] A.C. 148, 149.

(2) *Skeate* v. *Slaters Ltd.* [1914] 2 K.B. 429, 446.

(3) *R.* v. *Leonard Harris* 20 Cr.App.R. 144, 148.

(4) *Colonial Securities Trust Co.* v. *Massey* [1896] 1 Q.B. 38, 40.

(5) *Md. Sadiq Ali* v. *Fakr Jahan Begam* A.I.R. 1932 P.C. 13.

(6) *Virappa* v. *Periakaruppan* A.I.R. 1945 P.C. 35, 37.

(7) *Thomas* v. *Thomas* [1947] A.C. 484.

(8) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370, 375-6.

COURT OF APPEAL.

N. A. Marjoribanks for the appellant.

P. P. Dharmananda for the respondents.

The facts and arguments appear sufficiently from the judgment below.

Thomson C.J.: The appellant in this appeal was involved in a road accident in Ashby Road, Ipoh, on the evening of 5th February, 1956, and suffered personal injury for damages for which he sued the respondents.

The appellant's case was that on the evening in question he was driving a small open motor-car along Ashby Road on his correct side and at a reasonable speed. His right elbow was resting on the sill of his off-side window and was protruding 1½ to 2 inches beyond the side of the car. A lorry coming in the opposite direction was being driven at high speed and as it approached him swerved to its off-side to overtake two cyclists and a trishaw forcing him (the appellant) to drive on to the grass verge. In spite of this avoiding action the lorry struck his right elbow and caused him very considerable injury.

The appellant alleged that the first respondent was the owner of the lorry and at the time of the accident the second respondent who was the first respondent's employee was driving it with the permission of the first respondent in the course of his employment and was driving negligently. It was in consequence of this negligent driving that the appellant sustained his injuries.

Negligent driving was denied on the pleadings but it was also alleged that it was not the first respondent's lorry driven by the second respondent but some other vehicle driven by a person unknown which caused the appellant's injuries. It was also said that the appellant had sustained his injuries solely by reason of his own negligence which consisted in his driving his car with his right elbow resting on the off-side window sill.

At the trial the appellant himself gave evidence of the two British soldiers who said they had seen the accident and whose evidence had been taken on commission some fourteen months prior to the trial because they were then about to be returned to the United Kingdom. Both respondents also gave evidence.

After the evidence had been heard both counsel agreed that the Judge should in the first instance decide the question of whether it was the first respondent's lorry that was involved in the accident because clearly if the answer to that question was in the negative the questions of negligence, contributory negligence and *quantum* of damages would not arise and in the event, the Judge decided that the answer to that question was in the negative.

Judgment was accordingly entered for the respondents and it is against that judgment that the appellant has now appealed.

The evidence on the question of whether the first respondent's lorry was the lorry in the case is about to be discussed by Rigby J. and Hepworth J., in judgments which I have had the benefit of reading and with which I am in entire agreement. I agree that the trial Judge's finding on this question cannot be supported on the evidence and that for the reasons stated by my brothers it is one with which this Court ought to interfere. To take the matter any further myself would be a waste of time for if I did so

I should only be repeating in my own probably less felicitous words what is about to be said.

Having thus come to the conclusion that it was the first respondent's lorry that was the lorry in the case there remains to be decided the question of what course this Court should follow in the circumstances. It is not a case where a preliminary point of law has been taken. In such a case where there is an appeal and the judgment of the Court of Appeal does not finally dispose of the action then that judgment is in effect of a declaratory nature and the case in the Court below proceeds to trial subject to this Court's decision on the point of law. The present case, however, is one where the trial has been had and concluded by a final judgment in favour of one of the parties.

For myself I have searched the authorities with some care and have come to the conclusion that there are only two courses open to us. One is to order a new trial in exercise of our powers under section 40(1) of the Courts Ordinance. The other is to exercise our powers under section 38(4) of the Ordinance to give such judgment as we think ought to have been given.

For myself I think it would be wrong to order a new trial. There has to be some finality in litigation. Here each side has produced such evidence as it has seen fit. This evidence has been considered by the learned Judge in the High Court and it has been considered by us. We are of the opinion that it makes out one of the things the appellant must prove if he is to succeed. It would be wrong to place his case in jeopardy again on that particular point and I know of no authority for saying that our finding on a single isolated fact would be binding on any Court before which the case was tried again. A second trial might well end in the same way and for the same reason as did the first one. The plaintiff might well appeal again and the question being a question of fact a differently constituted Court of Appeal might come to a different opinion from the one we have come to. Or it might come to the same opinion and order a third trial. To my mind such possibilities do not even bear contemplation.

On the other hand the case has now reached the stage where we are in just as good a position as the learned Judge who tried it to decide it as a whole. It has been established that the first respondent's lorry was the lorry in the case. The questions that remain to be decided are the questions of whether it was being driven negligently and whether the appellant himself was guilty of contributory negligence. The evidence that is relevant to these questions is that of the appellant and the two British soldiers and of the condition of the vehicles subsequent to the incident. There is no longer any question of credibility involved. We are in as good a position as was the trial Judge to decide whether the evidence makes out negligence on the part of the lorry driver and whether it makes out contributory negligence on the part of the appellant. In my view we should decide these questions.

Unfortunately neither at the trial nor before us have counsel had the opportunity of arguing these outstanding questions. In the circumstances I would adjourn the appeal for further argument to the next sitting of this Court at Ipoh.

I would add that I find support for my view as to the course which should now be taken in the following passage from the judgment of Collins M.R. in the case of *Paquin, Ltd.* v. *Beauclerk*:— [1]

> "I have come to the conclusion that we should be doing wrong to send this case back to be retried where there is no real controversy as to the facts, which are all ascertained before us, and where the only matter for consideration is whether, taking all these facts as proved, the necessary inferences arising therefrom do not entitle the defendant to judgment in point of law."

and the following passage of the judgment of Phillimore L.J. in the case of *Skeate* v. *Slaters, Ltd.*:— [2]

> "the cases lay down that when the Court, to which the motion for new trial is made, sees that the verdict was wrong; and sees also that upon the admitted facts, or the only possible evidence that could be given, the verdict should be the other way, and has all the materials before it, it may conclude the case, dispense with another trial by a jury, which will either result in a verdict for the applicant or be itself set aside and so *toties quoties*, and at once give judgment."

Rigby J.: I have had the advantage of reading the judgment of my brother Hepworth in this case. It expresses so clearly and completely the views and conclusions I had already formed as to the proper determination of this appeal that, subject to two observations on the facts, I feel that I cannot usefully add anything to it.

With the greatest respect to the learned trial Judge, I share to the full — and for the reasons which my brother Hepworth has stated — the doubt expressed by him as to the accuracy of the learned trial Judge's assessment of Sergeant Suleiman as a competent and reliable Police Officer in the circumstances of this case. In addition to the criticisms made by Hepworth J. I would add this further observation. The accident was reported to the Police on the evening of its occurrence and Sergeant Suleiman, who had taken charge of the investigation, proceeded to the Hospital that same evening to interview the appellant. The appellant was then, of course, in no fit condition to give a coherent statement to the Police Sergeant. But the Hospital Assistant, who was on duty at the time when the appellant was admitted to Hospital, said that he was accompanied by two British soldiers and that he recorded the name of one of them, Trooper Wales, 15/19 Hussars on receiving the injured man. That fact, and the name and designation of Trooper Wales, was, of course, available to the Police Sergeant for the purposes of his investigation. The vital importance of recording statements from potential witnesses to a crime or accident at the earliest possible opportunity is so elementary that it should require no further emphasis. It is true that it would appear that the day following the

accident both Troopers Wales and Burchinshaw were transferred to Kuala Lumpur in the ordinary course of their military duties and they remained there for approximately a week. But in the light of the subsequent history of this case it is in the highest degree regrettable that Sergeant Suleiman did not pursue his investigations to their logical and necessary conclusions either by obtaining statements from Troopers Wales and Burchinshaw that night or, if that was not practicable, the following day, or, alternatively, if even that could not be done, of ensuring that their statements were recorded by a Police Officer on their arrival at Kuala Lumpur.

One further and final observation. The accident occurred on the 5th February, 1956. On the 16th February Police Inspector Gurmukh Singh, who had by then apparently taken over as Officer in charge of the investigation into this matter, recorded statements from Troopers Wales and Burchinshaw at 4 p.m. and 4.30 p.m. respectively, some days after their return to Ipoh. The original typewritten and recorded statement taken from Trooper Burchinshaw states that it was taken on the 16th March, 1956 at 4.30 p.m. I am impelled to the conclusion that that must be a mistake for 16th February, 1956, since I find it difficult, if not impossible, to believe that Trooper Burchinshaw's statement would have been taken exactly one calendar month — plus half an hour — after Trooper Wales's statement. The natural sequence of events would, I apprehend, be to call both witnesses to the Police Station and record, first, Trooper Wales's statement, as the main witness, and then Trooper Burchinshaw's statement. Both Trooper Wales and Trooper Burchinshaw gave an account of what they saw and heard. Both of them stated that a lorry was concerned in the incident. Trooper Wales gave the number of the lorry as A. 6690. Trooper Burchinshaw did not give the number of the lorry. It is apparent from the statement itself that upon its conclusion he was asked several questions by the Police Officer recording the statement and his answers were duly recorded. What seems to me altogether remarkable is that the Police Officer did not apparently find it either necessary or desirable to put the question, and to record the answer, as to whether the deponent had seen the number of the lorry. The necessity for asking such a question, and recording the answer, seems to me elementary. It is, to my mind, all the more remarkable that no such question was asked, and answer recorded, having regard to the fact that Police Inspector Gurmukh Singh, quite properly, had specifically questioned Trooper Wales as to whether he had noticed the number of the motor-car involved in the accident, and as to when he noted the number of the lorry, and had recorded his answers to those questions. An accident had occurred which had resulted in serious injury to one of the persons involved in that accident. The Police had been at once notified and the possibility of a subsequent prosecution was apparent. In my view the manner in which the case was investigated by those responsible for its investigation was very far from satisfactory.

For the reasons given by Hepworth J., with which I find myself in entire agreement, I would allow this appeal.

Since writing this judgment, I have had the advantage of reading the judgment of the President of the Court. For the reasons given by him, with which I agree, I am of the opinion, and I would so order, that the issue of identification should be decided in favour of the appellant and that this Court should itself hear further argument on the remaining issue of negligence and give judgment thereon in accordance with the powers expressly conferred upon it by section 38(4) of the Courts Ordinance. The question of costs will stand over for further argument on the resumed hearing.

Hepworth J.: The appellant claimed damages in respect of personal injuries suffered by him which he alleged were caused by the 1st respondent's lorry striking his right elbow when he was driving his car in the opposite direction to the lorry on Ashby Road, Ipoh, on the 5th February, 1956, thus causing him severe injuries and permanent disablement. The 1st respondent was the owner, and the 2nd respondent was his employee and the driver, of a lorry No. A. 6690. The 2nd respondent denied that he was driving the said lorry at the place and time alleged in the Plaint. At the close of the evidence both Counsel agreed that it would be more convenient if the learned trial Judge were first to hear submissions on the question whether it was the 1st respondent's lorry which caused the injuries to the appellant, because if he were to decide that question in favour of the respondents the question of negligence and quantum of damages would not arise. This was done and the learned trial Judge dismissed the appellant's claim with costs to the respondents.

The identification of the lorry depended partly on the appellant's description of it and partly on the evidence of two British soldiers who happened to be walking on the road at the time in question. The soldiers both gave a description of the lorry tallying with that given by the appellant and with the appearance of the lorry itself, and also they both claimed to have observed the number of the lorry which they gave as A. 6690. The evidence of these two soldiers was recorded *de bene esse* by the Assistant Registrar on the 21st December, 1956.

The learned trial Judge found that the discrepancies between these soldiers' statements to the police in February or March, 1956, and their evidence given before the Assistant Registrar in December, 1956, were so substantial and these discrepancies, on a comparison being made in relation to the statements and the testimony of each of the soldiers, were so identical that the learned trial Judge found it impossible to have any confidence in their testimony. In so doing

the learned trial Judge purported to act in accordance with the observations of Lord Hewart, Lord Chief Justice, in his judgment in the case of *Leonard Harris* [3].

The learned trial Judge was further fortified in this conclusion by the fact that the appellant in his evidence said that he did not see the number of the lorry which struck him, while one sergeant Suleiman bin Safar of the Ipoh Traffic Branch, one of the appellant's witnesses, stated in his evidence that the appellant gave him the number of the lorry in the Ipoh hospital on the 7th February, 1956, two days after the accident.

With regard to the evidence of the two British soldiers the learned trial Judge's main objection was that in their statements to the police one of the soldiers said that the lorry overtook a cyclist before passing the appellant's car, and the other soldier said that it overtook a cyclist and a trishaw before it passed the appellant's car, while in their evidence before the Assistant Registrar both of the soldiers said that the lorry overtook 2 cyclists and a trishaw. The learned trial Judge stated that there were other discrepancies which would not have been sufficient in themselves to cause him to discredit these witnesses, but that the discrepancy as to the number of the cyclists and the existence of a trishaw bore the hall mark of an attempt to improve upon the account of the accident already given to the police, and as a result he rejected their evidence in toto.

Sergeant Suleiman gave evidence at the trial and impressed the learned trial Judge as "an experienced, competent and reliable police officer." The accident took place on the 5th February, 1956. Sergeant Suleiman went to the hospital at about 8.30 p.m. that day but found that the appellant was too ill to make a statement. He again went to the hospital on the 6th February and again the appellant was too unwell to make a statement. He again went on the 7th February when the appellant "could understand and talk," but the sergeant stated that he did not think the appellant was fit to give him a statement. He stated however that on the 7th the appellant gave him "a certain number of a certain lorry." The appellant, the sergeant said, did not tell him where he got the information. Sergeant Suleiman stated that on the 8th he examined the lorry, A. 6690. All this information was elicited from Sergeant Suleiman in cross-examination. At the conclusion of his evidence he stated, in reply to a question by the Court, "when plaintiff told me on the 8th that he could not remember the number of the lorry, I reminded him that he had told me the number on the previous day, and he said then that he was not sure of the number."

The learned trial Judge, on the evidence of the appellant, the two soldiers and Sergeant Suleiman, came to the conclusion, since the appellant admitted in evidence that he did not see the number of the lorry at the time of the accident, that, knowing that the 1st respondent with whom he was acquainted owned a lorry resembling the one which was involved, the appellant obtained the number of it from somebody else while he was in hospital and gave the number to Sergeant Suleiman in an attempt to fasten the responsibility for the accident on an ascertainable individual.

As a result of the conclusion which the learned trial Judge reached, he took the view that it was more probable than not that it was the appellant who gave the soldiers the number which they in turn passed on to the police, for the learned trial Judge stated that it appeared that the soldiers visited the appellant in hospital before they made their statements to the police.

It was submitted in the Court below that if it was the appellant who had informed the soldiers of the number of the lorry, having obtained the number from somebody else while he was in hospital, the appellant would have testified that he saw the number of the lorry at the time of the accident. The learned trial Judge, however, considered that the most likely answer was that that was *per se* improbable and that it was more likely that the appellant thought it would be more advantageous to leave the positive identification of the lorry to two ostensibly independent witnesses.

It was the appellant's case that the 1st respondent's lorry, driven by the 2nd respondent, a Sikh, and with a Sikh attendant, was responsible for the damage occurring in Ashby Road, Ipoh, at about 7 p.m. on the 5th February, 1956. It was not the respondents' case that none of the 1st respondent's lorries had been anywhere near the scene of the accident that day. The evidence was in fact that lorry No. A. 6690 belonging to the 1st respondent, answering the description given by the appellant and the two soldiers and driven by the 2nd respondent a Sikh, with a Sikh attendant, had been in the Ashby Road area that afternoon. The 2nd respondent stated that he was in that area at about 5 p.m. that day driving lorry No. A. 6690 but gave other evidence to show that he was not there at 7 o'clock, the time at which the accident was proved to have occurred.

This appeal is therefore an appeal against findings of fact by the learned trial Judge. The evidence upon which these findings of fact were based was given in the case of the 2 soldiers *de bene esse* before the Assistant Registrar and in the case of Sergeant Suleiman and the appellant at the hearing of the action before the learned trial Judge. Accordingly the learned trial Judge has had the advantage of seeing and hearing Sergeant Suleiman and the appellant but not the 2 soldiers.

When deciding what considerations should weigh with an Appeal Court when it is asked to upset a finding of fact by the Court below based on the evidence of witnesses whom the learned trial Judge has not seen or heard, the

following observations of Kay L.J., in *Colonial Securities Trust Co.* v. *Massey* [4] are relevant:—

"Some of the witnesses were examined in Court; but the case did not depend upon their evidence, but upon the evidence of witnesses taken upon commission. Order LVIII. shows without doubt that such an appeal as the present is a rehearing of the case; and, so far as the evidence taken on commission is concerned, this Court has the same means of judging of its value as the Judge had in the Court below. We must therefore try the case, and see whether we differ from the learned Judge; and if we do we must give the judgment which we think he ought to have given."

Sub-section (1) of section 38 of the Courts Ordinance, 1948, provides that appeals in civil matters to the Court of Appeal are by way of rehearing.

Also in the judgment of the Privy Council case of *Md. Sadiq Ali* v. *Fakr Jahan Begam* [5], at p. 19, Sir George Lowndes stated:—

"As the lady's evidence was taken on commission, the Judges of the Chief Court were in at least as good a position to appreciate its credibility as the trial Judge, and their Lordships must naturally attach the greater weight to their estimate."

And again in the judgment of the Privy Council of *Virappa* v. *Periakaruppan* [6], at p. 37, Sir Madhavan Nair stated:—

"As regards this argument (that due and sufficient regard had not been given to the well known rule that on a question of credibility of a witness great weight ought to be given to the judgment of the Judge who saw and heard the witnesses), their Lordships, besides saying that the High Court has arrived at its conclusion on a consideration of the merits of the evidence, need only observe that the argument as applied to this case is fallacious, as neither of the Courts which had to decide the case had the benefit of seeing and hearing the witness; and the 'Commissioner' who had that advantage does not in his report base his conclusion on the demeanour of the witness in the witness box or the impression produced by him on his mind."

When the evidence is that of witnesses whom the trial Judge has seen and heard the authority most frequently quoted on this question is the speech of Lord Thankerton in *Thomas* v. *Thomas* [7] at pages 487-8, and particularly the following passage:—

"I. Where a question of fact has been tried by a Judge without jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial Judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

This passage was quoted with approval by Lord Reid in the House of Lords in the case of *Benmax* v. *Austin Motor Co. Ltd.* [8] at pages 375-6, as being applicable to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial Judge to come to his decision on the case as a whole.

In the *Benmax case* there was no question of the credibility or reliability of any witness, and in such cases, and in cases where the point in dispute is the proper inference to be drawn from proved facts, it was held that an appeal court is generally in as good a position to evaluate the evidence as the trial Judge. The head note to the *Benmax case* reads:—

"There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. In the case of the latter the appellate tribunal will more readily form an independent opinion than in the case of the former which involves the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing."

The observations of Lord Somervell of Harrow in the *Benmax case* on the question in general are also noteworthy:—

"I would, as does he, respectfully differ from those who have suggested that an appeal on fact from a Judge sitting alone is the same as, or should be assimilated to, an appeal from a jury. Apart from the fact that in the former case the appeal is a rehearing, juries do not, and Judges in varying degrees do, give reasons for their conclusions. In a negligence action it may be clear on appeal from a Judge alone how he has found what have been conveniently called the primary facts. An appellate court must be free to consider whether a Judge, who has, I will assume, found for the plaintiff, applied the standard of the reasonable man, as our law prescribes, or the standard of a man of exceptional care and prescience.

"The advantages enjoyed by the trial Judge have often been stated and are, I am sure, familiar to all appellate courts. The difficult cases are those where there are circumstances which appellant and respondent can each rely on. The Judge has based his decision on the way in which witnesses give their evidence. Unless there is no dispute at all he always does this. On the other hand, there are sentences in his judgment which indicate very probably but not certainly that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness he has relied on, or his general conclusion. I only refer to this in order to emphasise the impossibility in my opinion of laying down anything in the nature of a code as to the circumstances in which an appellate court should interfere either by reversing the trial Judge or ordering a new trial."

In this case in the first place the credibility or reliability of witnesses is in question. Those witnesses are the two soldiers, Sergeant Suleiman, and, to a slightly lesser extent, the appellant. In the second place there have been findings of fact which were specifically found. The important findings so found were that the evidence of the two soldiers was so unreliable as to be valueless, that Sergeant Suleiman was an "experienced, competent and reliable police officer" whose evidence could be accepted, that the soldiers visited the appellant in hospital before they made their statements to the police, that the appellant knew that the 1st respondent, with whom he was acquainted, owned a lorry resembling the one which caused the damage, and that the 2nd respondent was not driving the lorry in Ashby Road at 7 p.m. that evening. In

the third place there have been findings of fact which were really inferences drawn from facts specifically found. These inferences were that the appellant had obtained the number of the lorry from somebody else while he was in hospital, that he told the soldiers the number of the lorry before they made their statements to the police, that the appellant thought it would be more advantageous to leave the positive identification of the lorry to two ostensibly independent witnesses, that it was *per se* improbable that if the appellant had obtained the number of the lorry from somebody else while he was in hospital he would have testified that he saw the number of the lorry at the time of the accident.

When considering the credibility or otherwise of the two soldiers and the discrepancies between their statements to the police and their evidence before the Assistant Registrar I think the nature of the discrepancies as well as the circumstances in which the statements and the evidence were given should be reviewed.

Take the nature of the discrepancies first. In their statements to the police both the soldiers referred to the presence of a cyclist and one of them to the presence of a trishaw as well. When they gave evidence before the Assistant Registrar they both said that there were two cyclists and a trishaw. It is undeniable that there is a discrepancy there and such discrepancy would no doubt have to be borne in mind when considering the question of negligence. But was this discrepancy, together with other minor discrepancies, sufficient to warrant the rejection of the whole of the evidence of the two soldiers? Taking the evidence of the two soldiers together it was a discrepancy in number and not in kind. In other words it is not as if they had said in their statements to the police that the lorry had overtaken a cyclist and a trishaw and when they gave evidence in Court they said the lorry had overtaken, to take an extreme example, a coach and four.

As regards the circumstances in which the statements and the evidence were taken, it appears that the statements of the two soldiers which were admitted in evidence as Exhibits P9 and P10 were not in themselves very satisfactory. The Acting State Traffic Officer, Ipoh, gave evidence to the effect that a statement made to a police officer in the course of a police investigation is normally read over to the person making it and at the foot of the statement the recording officer should write "read over to the witness and admitted by him to be correct." These words did not appear at the end of the statements of either of these 2 witnesses and there was no evidence to show that they were in fact read back to the witnesses. In addition when one of the soldiers was asked, in re-examination before the Assistant Registrar, to explain discrepancies between his statement to the police and his evidence, he stated, with reference to the statements to the police, "we went to make a statement but we were cross-examined." Inspector Gurmukh Singh of the Traffic Branch, who took the statements, not being called as a witness, there was therefore in the first place no positive evidence that these statements were correct.

In the second place their evidence was given before the Assistant Registrar some 10 months after the statements had been taken. The two soldiers were troopers and not officers or N.C.O.s and after a lapse of 10 months some discrepancies between a statement recorded 10 months before could be expected when they gave evidence in Court.

In the third place these two witnesses did not give their evidence before the learned trial Judge and accordingly he did not have the advantage of seeing and hearing them in the witness box. The learned trial Judge makes no reference whatever in his judgment to the manner in which the statements were taken or to the lapse of time before evidence was taken before the Assistant Registrar. The learned trial Judge assessed their credibility on the intrinsic contents of their evidence before the Assistant Registrar and of their statements to the police, the former of which was taken some 10 months after the event and the latter of which are, for the reasons I have already stated, open to serious criticism.

As to Sergeant Suleiman's reliability it was not contested that he made no entry in his notebook of the number of the lorry which he alleged in his evidence the appellant gave him in the hospital on the 7th February, nor is there any reference in the police report, made by the appellant to Sergeant Suleiman and recorded by Sergeant Suleiman on the 8th February, to Sergeant Suleiman reminding the appellant that he had told Sergeant Suleiman the number of the lorry on the previous day and that the appellant replied then that he was not sure of the number. Failure on the part of Sergeant Suleiman, who had been in the Ipoh Traffic Branch, on his own evidence, for several years, to record two matters of such vital importance either from a criminal or civil view of the case makes one wonder whether the learned trial Judge's assessment of Sergeant Suleiman as a competent and reliable police officer was in all the circumstances justified, however experienced and however apparently efficient he may have appeared in the witness box.

With regard to the finding that the soldiers visited the appellant in hospital before they made their statements to the police, it is not at all clear from the evidence whether in fact the soldiers saw the appellant before or after making their statements to the police. All that did appear clear was that they attended at the Traffic Branch, Ipoh, on 3 or 4 occasions.

As to the finding that the appellant knew that the 1st respondent owned a lorry resembling the one which caused the damage, there is no evidence whatever that the appellant, who was casually acquainted with the 1st respondent, had any knowledge that the 1st respondent owned a

lorry resembling the one which was involved, or in fact that the 1st respondent owned any lorry at all.

On the question of time, none of the 2nd respondent's evidence as to time was corroborated. The attendant was not called. Witnesses are frequently extremely vague as to what time of day it is at any particular time, and in fact the appellant himself had said in his Report that the accident occurred somewhere about 5.45 p.m. Although there is no doubt that the accident did take place at about 7 p.m., it may well be that the time given by the 2nd respondent is no more accurate than that given by the appellant. If the 2nd respondent's story as to his movements that day was accurate there would have been abundant evidence available to substantiate his story but none was forthcoming.

Bearing in mind the principles enunciated in the cases to which I have referred, and the fact that the learned trial Judge did not have the advantage of seeing and hearing the two soldiers in the witness box, and the unsatisfactory aspects of the recording of the soldiers' statements to the police, and the fact that the evidence before the Assistant Registrar was taken 10 months after the event, and the nature of the discrepancies, I am of the opinion that the discrepancies in the evidence of these two soldiers were not sufficient to justify wholly rejecting their evidence.

The learned trial Judge came to the conclusion that the appellant gave the number of the lorry to Sergeant Suleiman on the 7th February in an attempt to fasten the responsibility for the accident on an ascertainable individual as an inference from his findings of fact that the appellant knew that the 1st respondent owned a lorry resembling the one which caused the damage, of which there was no evidence whatever, and that Sergeant Suleiman was a competent and reliable police officer, an assessment which was not borne out by the facts, and from the inference which necessarily followed from such findings that the appellant must have obtained the number of the lorry from somebody else while he was in hospital, which was unsupported by any factual evidence. As a result of reaching this conclusion from these inferences the learned trial Judge took the view that it was the appellant who gave the soldiers the number of the lorry which they in turn passed on to the police, when it was by no means clear whether or not the soldiers visited the appellant in hospital before they made their statements. As I have already said I do not think that the evidence disclosed that Sergeant Suleiman was a witness upon whom any great reliance could safely be put, and in all the circumstances of the case, and in particular the fact that the Traffic Branch Inspector was himself a Sikh, it may well be that the information as to the number of the lorry came to Sergeant Suleiman from a source other than the appellant.

The inferences that the appellant thought it would be more advantageous to leave the positive identification of the lorry to two ostensibly independent witnesses and that it was *per se* improbable that if the appellant had obtained the number of the lorry from somebody else while in hospital he would have testified that he saw the number of the lorry at the time of the accident, were essential explanations if the learned trial Judge's conclusions were to be accepted. But in any event such inferences seem to me to overlook the risk involved in relying on the evidence of two witnesses who the appellant might have been unable to find again, the fact that the appellant's case would have been in no way weakened by his identifying the vehicle, and the fact that the pain the appellant was suffering for some days after the accident not only rendered him unfit to make a statement but also probably precluded him from thinking out such a plot.

In my opinion therefore the inferences which the learned trial Judge drew from the evidence of the two soldiers cannot be supported. I am also of the opinion that it unmistakably appears from the evidence that the reasons given by the learned trial Judge for accepting the evidence of Sergeant Suleiman are not satisfactory.

Since writing this judgment I have had the advantage of reading the judgment of the President of the Court and I am in full agreement with him as to the course that this Court should follow in the circumstances. The issue of identification having been decided in favour of the appellant I would order that this Court should itself hear further argument on the remaining issue of negligence and give judgment thereon, the question of costs to stand over until the resumed hearing.

Order accordingly.

Solicitors: *Lovelace & Hastings; Cheang Lee & Ong.*

LEOW WEI PIN v. MEYAPPA CHETTIAR

[A.C.J. (Rigby J.) February 2, 1959]

[Penang — Civil Appeal No. 15 of 1958]

Practice and Procedure — Judgment debtor — Consent judgment — Failure to comply with Court order to pay debt by instalment — Instalment more than one month in arrears — Remedy — Subordinate Court Rules, 1950, O.20 r.5(1), O.21 r.27(2) and O.22.

In this case the appellant was sued by the respondent for money lent. He consented to judgment and offered to pay the judgment debt by monthly instalments of $50 each. The learned President gave judgment accordingly and embodied in his order a direction in terms offered by the appellant; but the appellant failed to comply with that order. The respondent subsequently caused a judgment notice in Form 23 of the Subordinate Court Rules to be issued calling upon the appellant to show cause why he should not be committed to prison for wilfully neglecting to comply with the terms of the